No. 89-1331

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DENNIS GWIRTZ, *et al.*,
Petitioners,

v.

OHIO EDUCATION ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

POINT 1: Respondent Ohio Education Association ("OEA" or "union") asserts that this Petition is an attempt to relitigate "factual" determinations. Respondent's Brief in Opposition at 14-16. However, that assertion is merely part of a transparent effort to avoid this Court's review of an important constitutional issue through legerdemain.

The district court recognized that no salient facts were in dispute in this case:

> It is basically undisputed that the level of assurance, and the level of detail is greater on an SAS 14 Special Report [the type sought by the nonunion teachers] as opposed to a SAS 29 Supplemental Schedule [the type disseminated by the OEA]. However, it is the [OEA's] position that the SAS 29 Supplemental Schedule is sufficient and adequate disclosure under *Hudson* and subsequent case law.

Appendix at 14a-15a.

The only truly disputed issue is the *legal* question of whether the union's use of the low-level SAS 29 Supplemental Schedule form of financial reporting properly protected the nonunion teachers' First Amendment right to refrain from "being compelled to subsidize the propagation of political or ideological views that they oppose." *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 305 (1986). The court of appeals also recognized that only a legal issue, not facts, was in dispute when it stated:

> Admittedly, an Auditing Standard No. 14 Special Report would, as the [teachers] contend, give more detailed financial information to them than does the Auditing Standard No. 29 Supplemental Schedule currently provided by the [union]. However, the mere fact that a Special Report would provide "better" or more detailed financial information does not make provision of a Special Report by the union constitutionally required.

Gwirtz v. OEA, 887 F.2d 678, 682 (6th Cir. 1989) (Appendix at 8a).

The testimony in the district court was hardly "conflicting" on the critical facts, as Respondent's Brief at 6 misleadingly characterizes it. The union's auditor

admitted that had he been authorized by it to perform a higher-level audit engagement, he would have been required to perform more detailed audit testing specifically on the chargeability vs. nonchargeability breakdown for each of the union's sixteen major categories of expenditures. *See* Robert Birzer at Transcript ("TR") 116 & 168 (admitting that a higher-level engagement "could have resulted in an additional lot of testing," and thus a "higher level of assurance" to the agency fee payors).

In short, no disputed factual issues are presented to this Court for review. It is undisputed that the union had open to it readily available and higher-level auditing options, but wilfully chose to give the nonunion teachers only low-level financial reports which provided little independent assurance that the agency fee calculation was in any way accurate. The dispute is exclusively over the legal issue of whether the First Amendment, as interpreted in *Hudson* and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), requires use of the better financial disclosure that the union could have readily chosen.

It is respectfully submitted that this case, with its detailed record of expert accounting testimony, provides a perfect opportunity for this Court to decide this timely and important constitutional issue.[1]

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[1]Respondent's Brief at 15 criticizes the teachers for including highlights of the expert testimony in their Petition. The expert testimony was summarized solely to help this Court understand the *true* nature of the low-level agency fee engagement unilaterally structured by the union. The district court recognized that the expert testimony was an "educational process" for the courts, and was "helpful to the Court in a broad grasp." (TR at 32-33). Obviously, the union's interests are served if this Court is denied an explication of the crucial differences between the low-level engagement structured by the union, and the higher-level engagement sought by the nonunion teachers. **[note cont'd on p. 4]**

POINT 2: The agency fee "supplemental schedule" reports issued by the union were *not* subjected to a separate and specific audit of the agency fee *chargeability vs. nonchargeability calculations*. By inferring otherwise, Respondent's Brief at 4 & 14, the union again resorts to sleight of hand in attempting to avoid this Court's review.

A careful reading of the auditor's "opinion letters" (Appendix at 24a-25a) shows that the agency fee supplemental schedule reports were audited *only* "in relation to the basic financial statements taken as a whole." The agency fee assertions were *not* subjected to a separate and independent audit standing alone. (Robert Birzer at TR 115-18). The union's auditor admitted that agency fee information is *not* a part of any entity's "basic financial statements," and thus those basic statements are essentially irrelevant to the breakdown of expenses into chargeable vs. nonchargeable categories. (Robert Birzer at TR 167-69). To put this in a practical context, we posit the following analogy: If a customer of a store wanted to have *his* bill verified, he would take small comfort from knowing that his bill had been audited, but *only* in the sense that the store's receipts from all customers across the country were audited in common.

Here, the teachers seek verification specifically on the union's *chargeability vs. nonchargeability calculations*, in order to ensure that they receive an "appropriately justified advance reduction" which minimizes "both the impingement" of the agency shop on their First

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It also should be noted that Respondent's Brief contains at least five pages of detailed discussion of the record and expert testimony, thus committing the same "sin" for which the teachers were accused. Respondent's Brief at 7-11.

Amendment rights and "the burden" of objection. *Hudson*, 475 U.S. at 309. No amount of obfuscation by the OEA can blur the fact that no audits were performed specifically on the agency fee issues standing alone. In fact, the union concedes, as it must, that it could have engaged the auditors to specifically audit the agency fee calculations standing alone, and that this would have provided a higher level of precollection assurance to the teachers that the calculations and seizures from their wages did not include charges for political and ideological activities they abhor. Respondent's Brief at 10 (describing the findings of the district court).

POINT 3: Respondent's Brief at 16-19 asserts that the traditional "least restrictive means" test does not apply to this First Amendment case, although its discussion of this issue is striking for what it omits. The union fails to discuss *Ellis*, 466 U.S. at 443-44, where the Court implicitly applied the least restrictive means test to require unions to utilize "advance reduction" and "interest-bearing escrow accounts" to ensure that nonmembers' money is not committed to improper uses even temporarily. Where there are "readily available alternatives . . . that place only the slightest additional burden, if any, on the union," the Court held, those alternatives must be utilized. *See also Hudson*, 475 U.S. at 303 & nn.11-12 (explicitly applying strict scrutiny).

To support its assertion that the nonunion teachers are entitled only to watered-down protections of their First Amendment rights, the OEA takes out of context this Court's statements that there must be "an *adequate* explanation of the basis for the fee" and that "absolute precision in the calculation of the charge to nonmembers cannot be expected or required." *Id.* at 307 n.18, 310, quoted in Respondent's Brief at 16-17 (emphasis added).

The OEA ignores this Court's holding that the requisite notice and financial disclosure must be "sufficient *to satisfy the First Amendment concerns* in this context." *Id.* at 306 n.17 (emphasis added). Also, the fact that "absolute precision" is not required does not mean that the union has *carte blanche* to calculate the fee with little or no precision. As one lower court held, only "a limited amount of imprecision is tolerable in calculating a service fee." *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1482, 1484 (W.D. Mich. 1988); *see Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987).

In short, the lower courts' refusal to apply the least restrictive means test to protect the teachers' First Amendment rights cannot be reconciled with this Court's precedents.

POINT 4: The union's argument also fails to recognize that the audit required by *Hudson* serves a purpose other than to give the nonmember sufficient information to decide whether or not to object to the amount of the service fee. *See* Respondent's Brief at 16-18. An equally important purpose is "to provide adequate *justification* for the advance reduction of dues," *Hudson*, 475 U.S. at 309 (emphasis added), to reduce the risk that the fee collected from objecting nonmembers will include costs that are not constitutionally chargeable to them.

"[I]n this context, the procedures required by the First Amendment *also provide the protections necessary for any deprivation of property*." *Id.* at 304 n.13 (emphasis added). As Respondent's Brief at 18 points out, *Hudson* allows unions "to collect fees without a predeprivation hearing." That does not mean that *Hudson* allows unions to collect fees without *any* "reliable 'initial check against mistaken decisions.' " *Brock v. Roadway Express, Inc.*, 481 U.S. 252,

263 (1987) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)). No such reliable predeprivation check—"adequate justification for the advance reduction of dues," *Hudson*, 475 U.S. at 309—is provided by the self-interested union officials who calculate the fee. *See id.* at 308. Thus, it must be provided by the "verification by the independent auditor," *id.* at 307 n.18; *see Tierney v. City of Toledo*, 824 F.2d 1497, 1502-03 (6th Cir. 1987); *Damiano*, 830 F.2d at 1369-70.

POINT 5: The OEA attempts to obscure the lower courts' confusion and conflict as to the meaning of *Hudson*'s requirement of "verification by an independent auditor." As discussed in the Petition, *Hohe v. Casey*, 727 F. Supp. 163, 166 (M.D. Pa. 1989), recognized the conflict between the Sixth Circuit's decision in *Tierney* and the Second Circuit's in *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (1987) on this issue. More recently, in *Antry v. Illinois Educational Labor Relations Board*, No. 4-88-0314, ___ Ill. App. 3d ___ (Mar. 15, 1990), the Illinois Court of Appeals also recognized the same conflict. In short, the fact that the union and the panel below refuse to acknowledge that conflict does not negate its existence.

Furthermore, notwithstanding the court's attempt in *Hohe*, 727 F. Supp. at 166, to distinguish that case from this one, it is clear that the low-level reports disseminated to agency fee payors in this case would not comply with the strict requirements enunciated in *Hohe*. *See* Petition at 19-20.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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